



U. S. Department of Justice

Civil Rights Division

*Deputy Assistant Attorney General*

---

*Washington, D.C. 20530*

April 1, 1997

The Honorable John W. Drummond  
President Pro Tempore of the  
South Carolina Senate  
Attn: Mark Packman  
Dickstein, Shapiro, Morin, & Oshinsky  
2101 L Street, N.W.  
Washington, D.C. 20037-1526

Dear Mr. Drummond:

This refers to Act No. R.2 (1997), insofar as it provides for the 1997 redistricting plan for the South Carolina Senate, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on February 19, 1997; the most recent supplemental information concerning your submission was received on March 25, 1997.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. The Voting Rights Act requires that the submitting authority demonstrate that the proposed change neither has a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also Procedures for the Administration of Section 5, 28 C.F.R. 51.52. In Bear v. United States, the Supreme Court made clear that a voting change which diminishes "the ability of minority groups to participate in the political process and to elect their choices to office" is retrogressive and should not be precleared under Section 5. 426 U.S. 130, 141 (1976), quoting H.R. Rep. No. 94-196, p.60 (1975).

-

The appropriate benchmark used to determine whether a voting change makes minority voters worse off is "the voting practice or procedure in effect at the time of the submission," so long as the existing voting practice is legally enforceable under Section 5. See Procedures for the Administration of Section 5, 28 C.F.R. 51.54(b). We recognize that there may be a need to reduce minority voting strength to some extent in order to comply with the order in Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996), and revisions tailored to address those problems would not be unlawful under Section 5. Thus, in the circumstances of this submission, the senate redistricting plan embodied in Act No. 49 (1995), modified to address the constitutional infirmities in that plan identified by the court, constitutes the appropriate benchmark for measuring retrogression.

In the case of a statewide redistricting, Section 5 requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in adopting the particular plan. The submitted plan provides for nine districts with black voting age population majorities. The 1995 plan provides for eleven such districts. In its submission of Act No. R.2, the state acknowledges that the submitted plan reduces the black population significantly in senate Districts 29 and 37. Under the submitted plan, District 29 is reduced from 56.2 percent black in voting age population to 41.5 percent. District 37 is reduced from 55.5 percent black in voting age population to 42.6 percent. Thus, under the submitted plan, both districts no longer have black voting age population majorities. In the context of the racially polarized voting patterns that the court found to exist, see Smith, 946 F. Supp. at 1202, these reductions will significantly hinder black voters' electoral opportunities in these districts.

The state justifies these substantial reductions by asserting that they were necessary to comply with the court's order in Smith. The Smith court held that senate Districts 29, 34, and 37 were drawn with race as the predominant factor and that the state had not met the strict scrutiny test with respect to any of these districts. Thus, the court concluded that the districts violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, as interpreted by the Supreme Court in Shaw v. Reno, 509 U.S. 630 (1993), Miller v. Johnson, 115 S.Ct. 2475 (1995), and subsequent Supreme Court rulings construing those cases.

As noted above, a reduction in minority voting strength that is required by the United States Constitution does not violate Section 5. Indeed, we have long applied this principle in the context of voting changes made by jurisdictions in order to comply with the constitutional one-person, one-vote requirement. See Fed. Reg. 488 (Jan. 6, 1987). This same principle applies to the Equal Protection holdings of the Supreme Court since Shaw. Those holdings apply to the circumstances presented by the submission pending before us. Thus, each of the significant reductions in minority voting strength proposed by the state must be evaluated in light of the Smith decision and the particular circumstances surrounding the altered districts.

Applying these principles, we have concluded that the state has met its burden under Section 5 with respect to all but one district in the 1997 senate redistricting plan. However, with respect to District 37, we have concluded that the state has not met its burden of demonstrating that the significant reduction in black voting strength was necessary for the state to comply with the Smith court's order.

From our analysis of the geography and demographics of the area in and around the proposed District 37, it appears that there are alternative configurations that would minimize the reduction in black voting strength in District 37. Our review of the minority population concentration in this region also reveals that there were choices available to the state that would substantially address the Smith court's constitutional concerns and not significantly diminish black voting strength in neighboring senate districts.

In addition to our own analysis, we also have reviewed the alternate approach to devising districts in this area as reflected in the 1995 senate staff plan. We were not provided with sufficiently detailed data to fully analyze the senate's contentions that the staff plan does not adequately remedy the Smith court's concerns. Nevertheless, the staff plan does inform the retrogression analysis by illustrating that the inclusion of compact black population areas in neighboring Williamsburg and Dorchester Counties is one way of minimizing the diminution of black voting strength in District 37 resulting from removing the population from the City of Georgetown that was in the existing district.

Further, as the state is aware, counsel for the citizen defendant-intervenors has developed and submitted an illustrative plan that includes a reasonably compact majority black District 37 that does not diminish black voting strength to the degree seen in the senate's proposed plan and does not reduce black voting strength significantly in neighboring majority black districts. That plan also would appear to substantially address the Smith court's concerns.

We have given careful consideration to the state's arguments with respect to both the 1995 staff plan and the defendant-intervenors' plan. Of course, we do not suggest here that the state must adopt either of those plans or any other particular plan. However, the illustration of the ability to create a compact district that minimizes the reduction in black voting strength precludes us from concluding that the state has met its burden of demonstrating that the significant retrogression in District 37 was necessary to address the Smith court's constitutional concerns.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state has sustained its burden of proving that as to the proposed District 37, the plan does not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" that is not required to bring the senate districts in compliance with the Equal Protection Clause of the Fourteenth Amendment. See Beer, 425 U.S. at 141. Accordingly, on behalf of the Attorney General, I must object to the 1997 redistricting plan for the South Carolina Senate.

In addition, preclearance may not be granted if implementation of the change would clearly violate Section 2 of the Act, 42 U.S.C. 1973. 28 C.F.R. 51.55. An examination of the election data for primary and general elections from 1988 through 1996 reveals the existence of legally significant racial bloc voting patterns in the District 37 area. Moreover, the Smith court found that racially polarized voting is present in all the challenged senate districts, including the District 37 area. See Smith, 946 F. Supp. at 1202. Further, as described supra, there is a compact majority black population in this area such that an additional senate district with a black voting age population majority can be created.

These factors clearly demonstrate the existence of the preconditions for a Section 2 violation under Thornburg v. Gingles, 478 U.S. 30 (1986). Additionally, the long history of official discrimination in South Carolina affecting black citizens' right to vote is undisputed, and as the Smith court found, substantial socioeconomic disparities between black citizens and white citizens persist. See Smith, 946 F. Supp. at 1203. Further, election data indicate that voter participation levels among blacks continue to lag behind those of whites in this part of the state.

Accordingly, I must also, on behalf of the Attorney General, object to the 1997 redistricting plan for the South Carolina Senate on the ground that it represents a clear violation of Section 2 of the Voting Rights Act.

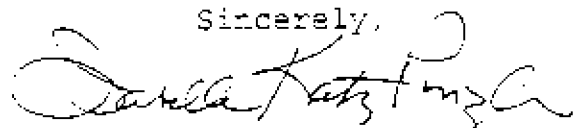
We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia is obtained, the proposed 1997 state senate redistricting plan continues to be legally unenforceable. Clark v. Rameer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the state of South Carolina plans to take concerning this matter. If you have any questions, you should call Rebecca Wertz (202/514-6342), Deputy Chief of the Voting Section.

With regard to the special election schedule, we are continuing our review of this voting change and expect to make a determination on this matter by April 21, 1997.

Because the redistricting of the South Carolina Senate is at issue in Smith v. Beasley, Civil Action No. 3:95-3235-C (D.S.C.) (three-judge court), we are providing a copy of this determination letter to the court.

Sincerely,



Isabelle Katz Pinzler  
Acting Assistant Attorney General  
Civil Rights Division

cc: Counsel of Record